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Removing Intrastate Lawsuits: The Affecting-Commerce Argument After *United States v. Lopez*

Kelly G. Black

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Removing Intrastate Lawsuits: The Affecting-Commerce Argument After *United States v. Lopez*

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I. INTRODUCTION

To address the problem of multiparty, multiforum lawsuits, the American Law Institute (ALI) has proposed allowing the consolidation of all related actions in a single forum. State court actions could be removed for consolidation along with related federal actions. Since many of these state actions fall outside traditional diversity and federal question jurisdiction, the ALI has proposed that Congress could authorize their removal under "Congress's Article I interstate commerce

powers.”¹ The ALI apparently relies on Supreme Court decisions stating that the commerce power extends to all activity, whether interstate or intrastate, “commerce” or not, which alone or in the aggregate substantially affects interstate commerce.² Although the ALI does not expressly show how its proposal satisfies the substantial-effects standard,³ it apparently concludes that the aggregate of all intrastate litigation substantially affects interstate commerce.⁴

1. AMERICAN LAW INSTITUTE, *COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS* § 5.01 cmt. d at 235 (1994).

2. The Court stated in *United States v. Darby*, 312 U.S. 100, 114 (1941), and repeated in *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258 (1964), that

[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.

The same idea has been differently expressed to the same effect:

[T]he federal commerce power extends to intrastate activities only where those activities “so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce.”

North American Co. v. SEC, 327 U.S. 686, 700 (1946) (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942)). *See also Wickard v. Filburn*, 317 U.S. 111, 125, 127-28 (1942) (upholding commerce power to regulate the quantity of wheat produced for home consumption because, “even if [the] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce”; the fact that the effect of the farmer’s activities “may be trivial by itself” is irrelevant where the effect “taken together with [the activities] of many others similarly situated, is far from trivial”).

3. The ALI explains that removal is not exempted from the commerce power merely to protect “traditional state functions.” *See* AMERICAN LAW INSTITUTE, *supra* note 1, § 5.01 cmt. d, reporter’s note 14, at 236-37. It also briefly analyzes the commerce power in other contexts. *Id.* § 3.08 cmt. e at 155-56; *id.* at 310-11, 312-13.

4. This appears to be the rationale for the ALI’s reasoning in the consolidation context as well. The ALI states that “[t]he inability to transfer and consolidate all or at least most of the units of a complex litigation could result in judicial and societal diseconomies that cumulatively would affect interstate commerce detrimentally.” *Id.* § 3.08 cmt. e at 155. The ALI also notes that “the underlying transactions are ones that clearly have an impact on interstate commerce.” *Id.* For these reasons, the ALI concludes, “a federal statute expanding personal jurisdiction to allow for the consolidated adjudication of complex cases legitimately may be based on Congress’s authority under the Commerce Clause.” *Id.*

The decision in *United States v. Lopez*,⁵ however, calls into question both the ALI's conclusion and the standard which it applies. The Court there apparently limited the expansive substantial-effects test to "economic" or "commercial" activities.⁶ The Court deferred many difficult questions raised by the dissent, including the definition of "commercial activities," and left open a range of possible answers to these questions with varying implications for federal power over intrastate litigation. I outline these questions, identify their most likely answers, and conclude that the affecting-commerce branch of the commerce power would authorize removal of intrastate litigation only if a jurisdictional requirement were imposed and satisfied.⁷

II. THE ALI PROPOSAL AND INTRASTATE LITIGATION

Over the past thirty years, our nation's courts have increasingly faced complex litigation—related lawsuits involving multiple parties in multiple forums.⁸ The ALI has characterized this phenomenon as wasteful of attorney and client resources, burdensome on courts, unjustly slow, duplicative, and otherwise unjust.⁹ Although Congress has dealt with some aspects of the complex litigation problem,¹⁰ it has neither provided uniform rules of liability¹¹ nor authorized consolidation of all related lawsuits for more than pretrial purposes.¹²

Through its Complex Litigation Project,¹³ the ALI addresses the complex litigation problem by recommending procedural improvements governing the handling of complex litigation¹⁴ rather than substantive rules governing such questions as liability and damages.¹⁵ Among other proposals,

5. 115 S. Ct. 1624 (1995) (5-4 decision).

6. See *infra* part III.

7. See *infra* part IV.

8. AMERICAN LAW INSTITUTE, *supra* note 1, at 7, 12-13.

9. *Id.* at 7, 16-18.

10. *Id.* at 7-10 (discussing the creation and operation of the Judicial Panel on Multidistrict Litigation, which consolidates separate but related "civil actions for pretrial proceedings"); see *id.* at 9-12 (discussing the history of complex litigation).

11. See *id.* at 305 (discussing the improbability that Congress will provide substantive rules).

12. *Id.* at 9-10, 21-23.

13. For an explanation of the Project's organization, see *id.* at 1.

14. *Id.* at 305 (explaining choice of procedural rather than substantive proposals).

15. *Id.* at 3-4 (proposing that substantive law is outside the Project's scope);

the ALI would authorize a Complex Litigation Panel¹⁶ (Panel) to remove from state courts actions related to a federal action, and to consolidate the actions into a single federal¹⁷ or state¹⁸ action. Under the proposed standards, the Panel would have power to remove "intrastate litigation," a term I use in this paper to refer to actions that are originally filed in a state court between citizens of the court's state, and in which state law alone provides the substantive law to be applied.¹⁹ So

id. at 305 (discussing the improbability that Congress will provide substantive rules).

16. The ALI proposal authorizes a Complex Litigation Panel (Panel) to consolidate all related federal actions into a single federal or state action. *See id.* § 3.02 (establishing and empowering the Panel); *id.* § 3.01(a) (providing the standard for transfer and consolidation); *id.* § 4.01(a) (authorizing consolidation in state courts). More precisely, actions may be "transferred and consolidated" (rather than merely "consolidated") only if filed in more than one United States District Court. *Id.* § 3.01(a). Presumably, other law governs the consolidation of multiple actions filed in the same district court or in other federal trial and appellate courts. *Id.* But *see id.* § 3.01 cmt. a at 39 (language not intended as limitation). The standard for transfer and consolidation is likewise not "all related actions" but whether the actions share a common question of fact and whether their transfer and consolidation "will promote the just, efficient, and fair conduct of the actions." *Id.* § 3.01(a)(1)-(2).

The proposal establishes choice of law rules to govern the action once consolidated in federal court. *See id.* §§ 6.01-6.08.

17. *See id.* § 3.02 (establishing and empowering the Panel); *id.* § 5.01(a) (providing the standard for removal and consolidation). This statement is somewhat simplified. The standard for removal and consolidation is again not whether the actions are "related," but whether they "arise from the same transaction, occurrence, or series of transactions or occurrences." *Id.* The Panel is also directed to refer to the § 3.01 standard, *supra* note 16, and to consider disruption of the "state court or regulatory proceedings," the "burden on the federal courts," and a list of other factors. *Id.* § 5.01(a).

18. *Id.* § 5.01(a) ("If the standard is met, the Panel may order the cases removed, consolidated, and transferred pursuant to § 3.04."); *id.* § 4.01(a) (allowing transfer under § 3.04 to be made to a state court). The combined effect of these provisions is to allow the Panel to remove actions from state courts and to transfer and consolidate them into a single action in that or another state.

19. The standards for removal and consolidation are stated *supra*, note 17. No part of these standards suggests that an action should not be removed merely because it constitutes "intrastate litigation" in the sense that term is used in this paper. Some intrastate litigation may be exempt because removal and consolidation may not "promote the just, efficient, and fair conduct of the actions." *Id.* § 3.01(a)(2). Two factors relevant to this determination could weigh against removal of an action because state law alone would apply: "the existence and significance of local concerns" and "the subject matter of the dispute." *Id.* § 3.01(b)(c) to (d). Since, however, state law alone will apply in nearly all actions covered by the proposal, the applicability of state substantive law will presumptively seldom enter into the removal decision. Some intrastate litigation may likewise be exempt because removal would "unduly disrupt or impinge upon state court or regulatory proceedings," *id.* § 5.01(a)(2), or because of "the presence of any special local

defined, intrastate litigation provides neither traditional diversity jurisdiction nor traditional federal question jurisdiction.²⁰ Removal must therefore be justified on other grounds. This paper discusses only the validity of the ALI's proposal that the removal power may be justified under the affecting-commerce branch of the commerce power.²¹

III. UNITED STATES v. LOPEZ

For the first time in nearly sixty years,²² the Supreme

community or state regulatory interests," *id.* § 5.01(a)(e), or because removal would "result in a change in the applicable law that will cause undue unfairness to the parties," *id.* § 5.01(a)(f). Still, these considerations will allow removal and consolidation of many intrastate cases.

20. It is possible that the removal and consolidation laws themselves would create federal question jurisdiction. *But see* Richard A. Epstein, *The Consolidation of Complex Litigation: A Critical Evaluation of the ALI Proposal*, 10 J.L. & COM. 1, 42-49 (1990) (concluding that there is no federal question when federal law provides no element of substantive law). In other areas, Congress has "adopted," with some modifications, state rules of decision as "federal law," thus creating federal question jurisdiction, but the ALI does not recommend that technique here. *Cf.* Massachusetts Bonding & Ins. Co. v. United States, 352 U.S. 128 (1956) (discussing—without analysis of whether the adoption of state law as the federal rule of decision creates federal question jurisdiction—the Federal Tort Claims Act, which follows this approach). However, the question whether the removal and consolidation law would create federal question jurisdiction is beyond the scope of this paper.

21. I limit the scope of my paper to intrastate litigation because removal and consolidation would likely be justifiable under relatively traditional analysis if the parties were diverse or if the issues involved a federal question.

This paper does not address other questions raised by the removal of intrastate litigation, the resolution of which may render the argument in this paper moot. For example, it may be that federal laws authorizing removal and consolidation of intrastate litigation cannot create federal question jurisdiction even if Congress has power under the Commerce Clause to enact such laws. *See supra* note 20. Furthermore, supplemental jurisdiction or minimal diversity jurisdiction might offer independent authority to consolidate intrastate litigation in federal court, though not necessarily in state courts. Finally, principles of the commerce power other than the affecting-commerce cases may authorize removal and consolidation. *See* Perez v. United States, 402 U.S. 146, 150 (1971) (describing three categories of problems within the reach of the Commerce Clause).

Despite these possible limitations on the affecting-commerce question, the validity of the ALI's proposal to remove intrastate litigation may ultimately depend on the affecting-commerce rationale, and the effectiveness of the ALI proposal may depend on the ability to consolidate intrastate litigation with other related actions. Further, many of the questions raised in *United States v. Lopez*, 115 S. Ct. 1624 (1995), have implications for other branches of the commerce power. The question of congressional authority under the affecting-commerce rationale therefore deserves exploration.

22. *See* *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (striking down a labor act applicable to miners). My research has revealed no case between *Carter* and

Court this term held that an exercise of federal power exceeded the scope of the Commerce Clause. The Court's decision in *United States v. Lopez*²³ calls into question the ALI's assumption that the commerce power could justify removal of intrastate litigation. In *Lopez*, the Court addressed the appeal of Mr. Lopez, who had been convicted of possessing a firearm within 1,000 feet of a school in violation of the federal Gun-Free School Zones Act of 1990.²⁴ The Court analyzed the case under the affecting-commerce branch of the commerce power. In its discussion, the Court "start[ed] with first principles,"²⁵ chiefly the concepts of limited federal power and limited commerce power inherent in the Constitution's enumeration of federal powers and of types of commerce.²⁶ The Court quoted *Gibbons v. Ogden*'s²⁷ definitions of "commerce," "regulate," and "among" to demonstrate "that limitations on the commerce power are inherent in the very language of the Commerce Clause."²⁸ After reviewing the commerce cases through the modern era,²⁹ the Court emphasized that even its expansive modern-era precedents "confirm that [the commerce] power is subject to outer limits."³⁰

The Court quickly noted that the government's only viable argument was under the affecting-commerce branch of the commerce power.³¹ The Court clarified that activities regulated under this branch must "substantially affect," rather than merely "affect," interstate commerce.³² The Court then characterized its affecting-commerce cases as falling into two

Lopez that has invalidated a federal statute as beyond the reach of the Commerce Clause.

23. 115 S. Ct. 1624 (1995) (5-4 decision).

24. *Id.* at 1626.

25. *Id.*

26. See *id.* (implication of limited powers from enumeration of powers); *id.* at 1627 (quoting *Gibbons*' analysis that the enumeration of types of commerce implies that there are other types not enumerated and therefore not within Congress's power to regulate).

27. 22 U.S. (9 Wheat.) 1 (1824).

28. *Lopez*, 115 S. Ct. at 1626-27.

29. *Id.* at 1627-28.

30. *Id.* at 1628-29.

31. *Id.* at 1629-30. The affecting-commerce branch is the third of "three broad categories of activities [within the] commerce power": (1) "use of the channels of interstate commerce"; (2) "the instrumentalities of . . . or persons or things in interstate commerce"; and (3) "activities having a substantial relation to interstate commerce." *Id.*

32. *Id.* at 1630.

subcategories. The first involves “[a]cts regulating intrastate economic activity [that] substantially affect[s] interstate commerce.”³³ Through such acts, Congress can regulate both the economic activity itself and “activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.”³⁴ The second subcategory of cases involves acts imposing a “jurisdictional element [to] ensure, through case-by-case inquiry, that the [conduct] in question affects interstate commerce.”³⁵ The Court noted that the *Lopez* statute did not fall within either of these categories,³⁶ and that Congress had made no findings on the effect on interstate commerce of gun possession near schools when it enacted the statute.³⁷

Since a gun possession regulation did not fit within either of its subcategories, the Court examined the government’s arguments under the bare substantial-effects test: whether “Congress could rationally have concluded that [gun possession in a school zone] substantially affects interstate commerce.”³⁸ The government argued under this test that gun possession in a school zone “may result in violent crime.”³⁹ Violent crime imposes substantial costs that affect insurance premiums throughout the nation and discourage interstate travel to unsafe areas.⁴⁰ The government also argued that gun possession in a school zone “threaten[s] the learning environment.”⁴¹ A poor learning environment handicaps the educational process, “result[ing] in a less productive citizenry,” which in turn “ha[s] an adverse effect on the Nation’s economic well-being.”⁴²

The Court found the implications of these arguments inconsistent with the concept of limited federal power. Under the government’s approach, the Court could identify no activity beyond federal power, “even in areas such as criminal law enforcement or education where States historically have been

33. *Id.*

34. *Id.* at 1630-31.

35. *Id.* at 1631.

36. *Id.* at 1630-31.

37. *Id.* at 1631.

38. *Id.* at 1632.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

sovereign."⁴³ Although admitting the breadth of language in its affecting-commerce cases,⁴⁴ the Court reasoned that an expansive application of that language would, contrary to the first principles it had earlier articulated, create "a general federal police power."⁴⁵

IV. ANALYSIS OF *LOPEZ* AND APPLICATION TO INTRASTATE LITIGATION

The prevailing opinion of the Court, however, does not tell the complete *Lopez* story. Although a majority of the Court joined the opinion,⁴⁶ and all of the dissenters joined Justice Breyer's dissenting opinion,⁴⁷ there were two concurrences⁴⁸ and two additional dissents.⁴⁹ The six opinions raise a number of questions about the affecting-commerce branch of the commerce power,⁵⁰ and those questions affect the validity of federal power over intrastate litigation. The sections that follow discuss these questions and the Court's response, attempt to identify the most likely answers within the range of answers possible after *Lopez*, and apply those answers to intrastate litigation.

A. Constitutional Basis for a Commercial Limitation

The dissent criticized the Court's emphasis on the commercial context of its prior commerce cases as, among other things,

43. *Id.*

44. See *id.* at 1630 (admitting inconsistency in characterizing the test as "affect" and "substantially affect"); *id.* at 1634 (admitting that "some of our prior cases have taken long steps down [the] road [of granting Congress a general police power]," and that "[t]he broad language in these opinions has suggested the possibility of additional expansion").

45. *Id.* at 1632, 1633-34.

46. Justices O'Connor, Scalia, Kennedy, and Thomas joined the opinion by Chief Justice Rehnquist. *Id.* at 1625.

47. *Id.* at 1657 (Breyer, J., dissenting) (joined by Stevens, Souter, and Ginsburg, JJ.).

48. *Id.* at 1634 (Kennedy, J., concurring) (joined by O'Connor, J.).

49. *Id.* at 1651 (Stevens, J., dissenting); *id.* (Souter, J., dissenting).

50. Many of these questions also affect other branches of the commerce power. The Court's opinion affirmed "first principles" and judicially enforceable limits on the commerce power *before* turning to the "three broad categories" of commerce power that it felt were "[c]onsistent with [the] structure" of its introductory analysis. *Id.* at 1626-29. Thus, the Court's introductory analysis, contested in dissent, carries implications for all three branches of the commerce power.

an improper resort to "formula[s]" and "nomenclature."⁵¹ Justice Souter characterized as a "pitfall[]" the "gradation according to the commercial or noncommercial nature of the immediate subject of the challenged regulation," and decried the "hopeless porosity of 'commercial' character as a ground of Commerce Clause distinction in America's highly connected economy."⁵² Assuming the difficulty of identifying "commercial activity," it would be prudent to examine the Court's claim that it is a necessary distinction.⁵³

As the Court noted in *Lopez*, the Constitution's enumeration of powers implies that those powers are limited.⁵⁴ As applied to the Commerce Clause, this implication suggests that Congress's power is limited to "commerce," and, within the category of commerce, to that which can be considered to be "among the several States."⁵⁵ The construction of "commerce" to encompass items not constituting commerce "would extend words beyond their natural and obvious import."⁵⁶ Although the Court was careful always to refer to "interstate commerce" and not merely "commerce," the well-established aggregation principle effectively abandons the implication that there is commerce which is not among the several states. In an era which recognizes, in Justice Kennedy's words, that "any conduct in this interdependent world of ours has an ultimate commercial origin or consequence,"⁵⁷ a view of the commerce power that allowed the aggregate effect of noncommercial activity to determine the scope of the commerce clause would also destroy the category of noncommerce.⁵⁸

If the term "commercial" has ambiguities, those are ambiguities created by the Constitution's grant of power over "commerce." Judicial review of commerce power by necessity re-

51. *Id.* at 1663 (Breyer, J., dissenting).

52. *Id.* at 1653-54 (Souter, J., dissenting).

53. *Id.* at 1633.

54. *Id.* at 1632.

55. U.S. CONST. art. I, § 8, cl. 3; see also *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968) ("[T]he subject of federal power is still 'commerce,' and not all commerce but commerce with foreign nations and among the several states.") (quoting *Santa Cruz Fruit Packing Co. v. NLRB*, 303 U.S. 453, 466 (1938)).

56. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824). Although arguing against strict construction, Marshall explained that if by "strict construction" its proponents "contend[ed] only against that enlarged construction, which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle." *Id.*

57. *Lopez*, 115 S. Ct. at 1640 (Kennedy, J., concurring).

58. *Id.* at 1632-34.

quires an analysis of whether something is "commerce"—or at least "commercial"—at some level or another. If it is impossible to determine whether something is "commerce," then judicial review (under any standard) is impossible. If inquiry into commercial character is fruitless when looking at the activity regulated, it is also fruitless when determining whether a substantial (or significant) effect of the activity is on interstate *commerce*. If "commerce" is meaningless on both ends, Congress has power to regulate all activities which have significant interstate effects. Or, as the Convention phrased it (before rejecting it), "to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation."⁵⁹

A commercial limitation on the commerce power respects the traditional rule for resolving questions of constitutional power:

If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule, that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction.⁶⁰

Since the Commerce Clause grants power over commerce, it is proper to restrict federal power to commerce or at least to activities closely related to commerce.

In *Lopez*, the Court did not articulate a precise theory of the Commerce Clause that would respect both the constitutional text and its modern cases. One theory consistent with the constitutional text, *Lopez*, *Gibbons*, and the modern commerce cases would be to define "commerce" to include all "economic" or "commercial activity."⁶¹ This approach accommodates the broad power to enact economic regulation upheld in modern commerce cases without admitting that power over commerce

59. NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 31 (Adrienne Kochs ed., 1988).

60. *Gibbons*, 22 U.S. at 188-89.

61. Not all commerce is commercial in the economic sense, as the term also applies to navigation and interstate travel. See *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). The affecting-commerce rationale has been principally applied to the economic meaning of the word. I assume for present purposes that these terms are capable of judicial application.

grants power over what is not commerce. It also would explain *Lopez's* limitation of commerce power to economic or commercial activities, since other activities are not commerce.

Equating "commerce" with "commercial activity" could also be viewed as a modest extension of the definition adopted in *Gibbons v. Ogden*⁶²: "commercial intercourse."⁶³ Since intercourse implies the involvement of more than one person, some commercial activities do not qualify as commercial intercourse. The extension from "commercial intercourse" to "commercial activities," however, is natural in light of modern decisions extending the commerce power to the internal operations of a business. To conform to precedent, "commercial activity" would need to include activities such as manufacturing⁶⁴ and labor⁶⁵ which have in the past been excluded from the definition of "commerce."⁶⁶

B. Judicial Role in Enforcing the Commerce Power

As the Supreme Court noted in *Lopez*, it has consistently recognized the existence, if not the nature, of limits on the

62. 22 U.S. (9 Wheat.) 1 (1824). Similarly, an extension of Marshall's definition of "among the several States" explains the regulation in modern cases of *intrastate* commerce. Justice Marshall defined "commerce . . . among the several States" to include all commercial intercourse that affects more states than one. *Id.* at 189-90, 194. Marshall's test includes commercial activities which are local, which affect interstate commerce indirectly, and even those which do not affect interstate commerce indirectly. The test is not the effect on commerce but the effect of the activity on *more than one state*. Modern decisions could be justified under this definition of "among the several States" merely by recognizing interstate effect in the aggregate.

63. *Id.* at 189-90.

64. *United States v. E.C. Knight Co.*, 156 U.S. 1, 14-17 (1895) (excluding manufacturing from the definition of "commerce").

65. *Hammer v. Dagenhart*, 247 U.S. 251, 272-77 (1918) (excluding labor and production from the definition of "commerce").

66. Another possibility would be to construe "commerce" to encompass the original understanding of commerce as well as its modern equivalents in a service-based or information-based economy. Justice Thomas' research, *United States v. Lopez*, 115 S. Ct. 1624, 1643 (1995) (Thomas, J., concurring), may provide a starting point. This view would provide both stability, through its use of a fixed historical definition, and flexibility, through its recognition of modern equivalents. The modern-era cases could be reconciled to this approach not by calling the activities involved "commerce" but by acknowledging power under the Necessary and Proper Clause to regulate commercial activities directed at commerce. Justice Marshall's definition in *Gibbons*, however, is tied to the text and history of the Commerce Clause, and the acceptance of Marshall's definition throughout modern commerce jurisprudence probably forecloses alternative historical approaches such as the reliance on the Necessary and Proper Clause as suggested in this footnote.

commerce power.⁶⁷ As stated in *Maryland v. Wirtz*,⁶⁸ the "Court has always recognized that the power to regulate commerce, though broad indeed, has limits."⁶⁹ The Court continued in that case by identifying itself as the body to maintain the distinction between those powers within and beyond the commerce power of Congress.⁷⁰ Although the dissenters objected to the Court's application of this principle to the facts of *Lopez*, they did not object to the principle in the abstract.

The current reluctance to articulate limitations on the commerce power results in part from past failed efforts to find practical limitations. *Gibbons v. Ogden*⁷¹ defined the Commerce Clause broadly, to include all commercial intercourse that affected more states than one.⁷² Later Courts, however, tried to find limits on the commerce power by drawing distinctions between "direct" and "indirect" effects on interstate commerce.⁷³ The current test of commerce power speaks of a "substantial effect" on commerce.⁷⁴ These distinctions can be drawn, but a commercial limitation is better founded in constitutional text than are these distinctions. Moreover, assuming that the Court can identify a workable definition of "commercial activities," even an ambiguous definition seems more workable than a determination of directness or substantiality.

67. *Lopez*, 115 S. Ct. at 1628-29; e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 544 (1985) (overruling *National League of Cities*, but recognizing the possibility of a "substantive restraint" on the commerce power in favor of the states); *National League of Cities v. Usery*, 426 U.S. 833 (1976), overruled by *Garcia* (exempting from the commerce power certain regulations of states as states); *E.C. Knight Co.*, 156 U.S. at 16-17 (attempting to require a "direct" effect on interstate commerce); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-90, 194 (1824) (recognizing that the Commerce Clause applies to "commercial intercourse" but not to that which does not affect other states).

68. 392 U.S. 183 (1968).

69. *Id.* at 196. Indeed, the Court there recognized two limits: "The subject of federal power is still 'commerce,' and not all commerce but commerce with foreign nations and among the several states." *Id.* (quoting *Santa Cruz Fruit Packing Co. v. NLRB*, 303 U.S. 453, 466 (1938)).

70. See *id.* ("The Court has ample power to prevent what the appellants purport to fear, 'the utter destruction of the State as a sovereign political entity.'"). This quote applies directly only to the protection of the states from the commerce power, but the context implies that the Court recognizes other limits to the commerce power.

71. 22 U.S. (9 Wheat.) 1 (1824).

72. *Id.* at 189-90, 194.

73. See *United States v. E.C. Knight Co.*, 156 U.S. 1, 16-17 (1895).

74. E.g., *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258 (1964).

A commercial requirement would also keep the Court from assessing "directness," "substantiality," or other tests which essentially challenge the policy judgment of Congress. Justice Marshall stated in *Gibbons* that "[t]he wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are . . . the sole restraints on which they have relied, to secure them from its abuse."⁷⁵ Consistent with this deference, a determination of whether regulated activity constitutes commercial activity does not interfere with Congress's constitutional authority to regulate commerce. Instead, the determination merely decides the existence of that authority. While the same could be said of the "direct" or the "substantial" tests, the determination of these questions is by nature more bound up in policy questions than is the determination of whether an activity is commercial in nature.

Marshall's words are susceptible, however, of misinterpretation. For example, the Court currently requires Congress to have a rational basis for concluding that the activity conducted affects interstate commerce.⁷⁶ This approach is proper when, as has been the case to date, the activity regulated comes within the proposed definition of commerce.⁷⁷ Absent a commercial requirement, however, this approach would confuse deference to Congress's policy judgments with deference to Congress's judgments of constitutional authority. On the other hand, if the commerce power does not extend to noncommercial activities, a rational decision that those activities affect commerce would not grant constitutional authority over them.

C. Definition of "Commercial Activities"

The principal dissent argued that the Court's distinction between commercial and noncommercial activities⁷⁸ created a "legal problem" and was unhelpful in deciding *Lopez*.⁷⁹ As

75. 22 U.S. (9 Wheat.) at 197.

76. *E.g.*, *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 277 (1981); *Heart of Atlanta Motel*, 379 U.S. at 258.

77. See *infra* part IV.C.

78. *Lopez*, 115 S. Ct. at 1633 (Breyer, J., dissenting). The Court actually used the phrase "economic activity," *id.* at 1630, to distinguish its modern commerce cases, and later responded to the dissent's criticism with the phrase "commercial activity," *id.* at 1633, without defining either term. Because I perceive no intended difference in the terms, I use the phrases interchangeably.

79. *Id.* at 1664 (Breyer, J., dissenting).

mentioned above, Justice Souter further decried the commercial-noncommercial dichotomy's "hopeless porosity . . . as a ground of Commerce Clause distinction in America's highly connected economy."⁸⁰

The dissents' criticisms at first seem well placed, since nearly all aspects of society can be approached in economic terms. In his *Economic Analysis of Law*,⁸¹ for example, Judge Posner defined the "domain of economics" to encompass all "rational choice in a world—our world—in which resources are limited in relation to human wants."⁸² In this view, "[h]ousework is an *economic activity*, even if the houseworker is a spouse who does not receive pecuniary compensation."⁸³ Also within this definition is the "trading" of services in the traditional family between husband and wife,⁸⁴ the decision to exercise more or less care,⁸⁵ the decision to commit crime,⁸⁶ and government decisions regarding these and all other issues.⁸⁷ Indeed, all human activity directed at satisfying human wants is "economic activity" in this view if it consumes even one limited resource, such as time.⁸⁸ If the phrase "economic activity" were interpreted to encompass nearly all human activity, it would indeed be "hopeless[ly] porous] as a ground of Commerce Clause distinction,"⁸⁹ and useless in identifying judicially enforceable "outer limits" to the commerce power.⁹⁰

The Court's use of that term, however, reveals a more limited meaning and provides clues to establishing a workable approach to distinguishing between activities that are within and without the commerce power. First, the Court distinguished *Wickard* as "involv[ing] economic activity *in a way* that the possession of a gun in a school zone does not."⁹¹ This suggests that an activity's economic nature is to be determined by

80. *Id.* at 1654 (Souter, J., dissenting).

81. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (3d ed. 1986).

82. *Id.* § 1.1.

83. *Id.* at 6-7 (emphasis added).

84. *Id.* § 5.1.

85. *Id.* § 6.1.

86. *Id.* § 7.2.

87. *Id.* §§ 5.1, 6.1, 7.2, 19.1-29.2.

88. *Id.* § 1.1, at 3-4 (outlining the essential theory); *id.* at 6-7 (time as a cost).

89. *Lopez*, 115 S. Ct. at 1654 (Souter, J., dissenting).

90. *Id.* at 1628-29.

91. *Id.* at 1630 (emphasis added).

drawing analogies to decided cases, of which the Court viewed *Wickard* as “perhaps the most far reaching.”⁹² Although the Court does not explain what part of Filburn’s activity qualified it as “economic,” it is interesting to note that the *Lopez* Court recites the following features of *Wickard*: (1) Mr. Filburn operated a farm; (2) he regularly sold a portion of his wheat; (3) he regularly used his wheat to feed poultry and livestock and to seed future crops; (4) the Agricultural Assessment Act of 1938 “was designed to regulate the volume of wheat moving in interstate and foreign commerce”;⁹³ and (5) *Wickard* involved a challenge to the Act as applied.⁹⁴

If *Wickard* represents the outer limit of commerce power, one would expect “commercial activity” to include the operations of a business which regularly sells its products on the market or utilizes them for further production. In the *Wickard* decision itself, the Court points out that the Act applied only to wheat “that the farmer may harvest for *sale* or for his own *farm needs*.”⁹⁵ The Court’s later discussion of maintaining price “by sustaining or increasing the demand” may properly be limited to situations like Filburn’s, whose own *farm demand* was repeatedly stated to justify the Act.⁹⁶ When the Court refers to “[h]ome-grown wheat” as competing “with wheat in commerce,” the context is wheat grown on farms, not in residential gardens.⁹⁷ The Court in *Wickard* stated that it had “no doubt that Congress may properly have concluded that wheat consumed *on the farm* where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.”⁹⁸ The only plausible significance to the fact that the Act was challenged as applied would be to distinguish from *Wickard* a case in which a similar act were applied to a person not engaged in farming as a business.

In contrast with the Agricultural Assessment Act, the Gun-Free School Zones Act of 1990 was found to be “a criminal statute that by its terms has nothing to do with ‘commerce’ or

92. *Id.*

93. *Id.*

94. *Id.* at 1628 (“[T]he Court upheld the application of [the Act as amended].”).

95. *Wickard v. Filburn*, 317 U.S. 111, 119 (1942) (emphasis added).

96. *Id.* at 127-28.

97. *Id.*

98. *Id.* (emphasis added).

any sort of economic enterprise, however broadly one might define those terms."⁹⁹ As in *Wickard*, the regulated party in the Court's prior cases would in ordinary speech be described as operating a business and as offering products or services to third parties for gain.¹⁰⁰

The second clue to the Court's use of the term "commercial activities" is its admission that, "depending on the level of generality, any activity can be seen as commercial."¹⁰¹ On this ground, the Court criticized the dissent's commercial characterization of education as "lack[ing] any real limits."¹⁰² The Court's use of the terms "economic activity" or "commercial activity" must thus be understood to exclude any approach such as Judge Posner's that would encompass nearly all human activity. Although the Court admitted that its approach "may in some cases result in legal uncertainty," it considered that uncertainty the price of maintaining "judicially enforceable outer limits" on the Constitution's enumerated powers.¹⁰³

Third, the Court characterizes the question of commerce power as "necessarily one of degree."¹⁰⁴ The Court quotes for this proposition Justice Cardozo's concurring opinion in *Schechter Poultry*:

There is a view of causation that would obliterate the distinction of what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center. A society such as ours "is an elastic medium which transmits all tremors throughout its territory; the only question is of their size."¹⁰⁵

The context of this quote suggests a concern somewhat different than Cardozo's. Cardozo wanted to preserve a line between *interstate* and *intrastate* commerce. Having abandoned that battlefield,¹⁰⁶ the Court now applies the same reasoning to

99. *Lopez*, 115 S. Ct. at 1626, 1630-31 (footnote omitted).

100. *See id.* at 1630 (describing these activities in economic terms).

101. *Id.* at 1633.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 1633-34 (quoting *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring) (quoting *United States v. A.L.A. Schechter Poultry Corp.*, 76 F.2d 617, 624 (2d Cir. 1935) (L. Hand, J., concurring))).

106. Since the Court appears to accept aggregation in the economic sphere, *id.* at 1634 ("The possession of a gun in a local school is in no sense an economic

preserve a line between commercial and noncommercial activities. Although Cardozo's comments thus apply only by analogy, the analogy suggests that activities can be more or less commercial, and the more commercial the activity, the more likely its regulation will be upheld. The Court, however, does not identify the characteristics that would distinguish the degree of commerciality of two allegedly commercial activities.

One standard against which the Court could measure activities alleged to be commercial is a fixed historical definition. Federal regulation of activities sharing a number of similar characteristics with historic commerce would be permissible, while those with fewer or more remote similarities would be beyond federal power. Taking Justice Thomas's research as a starting point, historical commerce could be defined as "selling, buying, and bartering in merchandise, as well as transporting for these purposes."¹⁰⁷ While this definition would be fixed, it would only be the starting point. The Court would then ask whether the regulated activity shares strong enough similarities to historical commerce, a strong enough effect on that commerce, or a sufficiently close tie to it. Although these are all questions of degree, there would at least be a standard against which to measure the degree. Further, the approach would allow Congress to regulate modern equivalents of historical commerce—trade in services or information, for example.

Another possible approach would be to evaluate an activity's economic nature from a lay perspective, rather than an economist's—that is, to ask whether an ordinary person would describe the activity in economic terms. Those activities at the center of criminal and family law would not usually be so described, although an economist may so view them.

Under either the historical or lay standard, intrastate litigation is not likely to be classified as commercial activity, despite an economist's opinion. A lay person is likely to view a litigant's recourse to court as a remedy for a failed commercial transaction rather than as an independent commercial transaction. While the connection with the transaction out of which the litigation arose is obvious, resort to litigation is not

activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce."), there appears to be little local economic activity beyond federal power. The Court refuses, however, to extend the aggregation argument to noneconomic activity. *Id.*

107. See *id.* at 1643 (Thomas, J., concurring) (citation omitted).

typically a commercial actor's business. Moreover, if Congress attempted to regulate intrastate litigation by regulating litigants' lawyers, the regulation would not be directed at the commercial nature of the transaction between lawyer and client but at the client's choice of forum. Since, under this reasoning, Congress could regulate all aspects of state court advocacy, the Court is unlikely to uphold it.

D. Approach to Precedent

The *Lopez* Court's approach to precedent also drew fire from the dissent. In reviewing modern commerce decisions, the Court stressed the economic character of the regulated conduct, of the regulated parties, and of the legislation involved,¹⁰⁸ even though the decisions themselves had focused not on the commercial character of the regulated activities, but on their effect on interstate commerce.¹⁰⁹ The Court did not advance an explicit theory for this approach to precedent.

Yet federal courts are not required to adhere rigidly to precedent, and may for good reason overrule or distinguish prior cases.¹¹⁰ Even in systems which give greater emphasis to precedent, prior rulings can, for good reason, be limited to the material facts in those cases despite an accepted understanding that the case stood for a broader principle.¹¹¹ The

108. See *id.* at 1630 (characterizing *Hodel*, *Perez*, *McClung*, *Heart of Atlanta Motel*, and even *Wickard* in terms of "intrastate economic activity").

109. In Justice Breyer's words, "Although the majority today attempts to categorize *Perez*, *McClung*, and *Wickard* as involving intrastate 'economic activity,' the Courts that decided each of those cases did *not* focus upon the economic nature of the activity regulated. Rather, they focused upon whether that activity *affected* interstate or foreign commerce." *Id.* at 1663 (Breyer, J., dissenting) (citations omitted).

110. See 1B JAMES W. MOORE & JO DESHA LUCAS, *MOORE'S FEDERAL PRACTICE* ¶ 0.402[2], I-38 to I-40 (2d ed. 1995):

It has been argued by some that the holding or ratio decidendi of a decision goes no further than the law necessary to dispose of the precise facts presented, and all else is dictum. In a system in which it is assumed that a court has no authority to overrule its decisions, this narrow view of holding has great utility. It would be inflexible enough to make immutable everything the court *does*, let alone everything it *says*. In the federal system, however, courts are not inexorably bound by their prior decisions and thus in cases in which the issue is presented on a different record, the court is free to recognize the factual distinction, in some respect, or reconsider the principle previously announced and overrule the prior decision.

111. *E.g.*, Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40

Court has a duty to preserve the Constitution's framework of limited federal power, and this duty is good reason to limit its prior decisions to their commercial context. Justice Marshall recognized the limitation which facts properly exert on general language in prior decisions:

It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.¹¹²

Justice Marshall's reasoning is especially persuasive in the context of commerce power. Certain "expressions" in *Wickard*, for example, can be read more broadly than is warranted by the context. As noted above, the Court there analyzed Mr. Filburn's operations extensively before stating that "even if

YALE L. REV. 161, 181 (1930) (arguing, to show that his "material facts" approach to precedent does not give judges infinite freedom, that "[o]f course a court can always avoid a precedent by finding that an additional fact is material, but if it does so *without reason*, the result leads to confusion in the law" (emphasis added)). Professor Goodhart's discussion is quite helpful because it contrasts his view with two competing views. One view regards the Court's statement of relevant law, while another regards the facts alone. See *id.* at 162 ("The reason which the judge gives for his decision is never the binding part of the precedent . . ."); *id.* at 168 (disputing the approach which looks at facts alone). Goodhart instead sees the precedential value of a case in the court's conclusion on the facts which it selects as material. *Id.* at 169 ("It is by his choice of the material facts that the judge creates law.").

For a critique of trends toward *stare dictis* (accepting as law the court's statements rather than the decision on the facts) and arguing for a very limited view of precedent, see Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71, 159 (1928). For an extended exchange over Goodhart's and competing approaches, see J.L. Montrose, *Ratio Decidendi and the House of Lords*, 20 MOD. L. REV. 124 (1957) (criticizing the Goodhart approach as inconsistent with the "classical" approach to precedent); A.W.B. Simpson, *The Ratio Decidendi of a Case*, 20 MOD. L. REV. 413 (1957) (arguing that Goodhart's approach collapses into the classical approach); J.L. Montrose, *The Ratio Decidendi of a Case*, 20 MOD. L. REV. 587 (1957) (responding); A.L. Goodhart, *The Ratio Decidendi of a Case*, 22 MOD. L. REV. 117 (1959) (responding); Julius Stone, *The Ratio of the Ratio Decidendi* 22 MOD. L. REV. 597 (1959) (illustrating that the significance of a fact can vary depending on the degree of generality with which it is viewed).

112. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399-400 (1821).

appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached if it exerts a substantial economic effect on interstate commerce."¹¹³ This language is expressly limited to Mr. Filburn's activities, and would apply by analogy only to similar activities—not to all activities. The Court may have in fact thought that noncommercial activities, however remote in nature from commerce, should nevertheless be within the commerce power, just as Justice Marshall likely thought that his previous "general expressions" were correct.¹¹⁴ Neither question, however, was before the court deciding those cases.

From this contextual perspective, the modern commerce cases are consistent with a commercial limitation, and indeed with *Gibbons's* definition of commerce as "commercial intercourse."¹¹⁵ In *NLRB v. Jones & Laughlin Steel Corp.*¹¹⁶ and *United States v. Darby*,¹¹⁷ for example, the activities regulated were labor practices¹¹⁸ and the establishment of hours and wages for employees.¹¹⁹ These activities constituted "commercial intercourse," that is, the trading of services for pay, and Congress's determination that they affected more than one state was rationally based. *Wickard v. Filburn*¹²⁰ presents a more difficult case. The activity at issue in that case, the production of wheat that never leaves the farm,¹²¹ cannot easily be classified as commercial intercourse, since intercourse implies the involvement of more than one person. Mr. Filburn, though, regularly sold the wheat he produced and the animals he fed with the wheat.¹²² Even if the activity did not constitute commerce, it was clearly directed at commerce.¹²³ The activity likewise affected more states than one, at least when

113. *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (emphasis added).

114. See *Cohens*, 19 U.S. at 400-01 (Justice Marshall discussing his prior construction of federal jurisdiction and rejecting the application of very explicit reasoning to the very facts which he had previously hypothesized).

115. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-90 (1824).

116. 301 U.S. 1 (1937).

117. 312 U.S. 100 (1941).

118. *Jones & Laughlin*, 301 U.S. at 22.

119. *Darby*, 312 U.S. at 108-10.

120. 317 U.S. 111 (1942).

121. *Id.* at 114-15.

122. *Id.* at 114.

123. See *id.* at 127-28.

the production was considered "together with that of many others similarly situated."¹²⁴

Similarly, *Perez v. United States*¹²⁵ involved commercial activity. *Perez* concerned Congress's prohibition of loan-sharking as part of the Consumer Credit Protection Act.¹²⁶ The extension of credit is a rather obvious example of commercial intercourse, and its commercial nature is not diminished by the use of threats in the transaction. Congress's power to regulate commerce was, in part at least, intended to prevent violence between the states over commerce. The commerce power should not, therefore, be construed to prevent Congress from keeping commercial transactions peaceful.¹²⁷ Furthermore, extortionate credit as a class affects more states than one.¹²⁸

The discrimination cases can likewise be justified under this approach. In *Heart of Atlanta Motel v. United States*,¹²⁹ the activity regulated was the hotel's discriminatory service to its patrons, which involved commercial interaction between the hotel and its patrons. This interaction satisfied the definition of commerce and affected more states than one by discouraging interstate travel.¹³⁰ *Katzenbach v. McClung*¹³¹ similarly involved commercial activity between a restaurant's owners and its customers,¹³² and discrimination in that activity affected the free flow of food in interstate commerce.¹³³

In summary, a proper construction of the Commerce Clause justifies the results of modern affecting-commerce decisions without relying on their nearly limitless language. The commercial limit on that power is implied in the text of the Commerce Clause and is consistent with the facts of modern affecting-commerce cases. These cases all involve commercial intercourse, or at least commercial activity.

124. *Id.*

125. 402 U.S. 146 (1971).

126. *Id.* at 146-47.

127. *See id.* at 147 (stating that extortionate credit transactions were defined as those involving the use or threat of violence).

128. *Id.* at 152.

129. 379 U.S. 241 (1964).

130. *Id.* at 253.

131. 379 U.S. 294 (1964).

132. *Id.* at 296.

133. *Id.* at 303-04.

E. Regulation of Noncommercial Activity

Identifying an activity as noncommercial, however, does not of necessity foreclose its regulation.

1. Noncommercial activities arising out of commercial transactions

First, activities which "arise out of or are connected with a commercial transaction"¹³⁴ may be proper subjects of regulation. To qualify for this type of incidental regulation, the commercial transaction—and not the activities related to it—must produce the substantial effect on interstate commerce when viewed in the aggregate with like transactions. Further, the regulation must be essential to the effective regulation of "commerce" or of "economic enterprise."¹³⁵

If all these elements must be satisfied to justify regulation of noncommercial activities, intrastate litigation is beyond federal commerce power. Although intrastate litigation will nearly always arise out of commercial transactions, and although those transactions in the aggregate substantially affect interstate commerce, the ALI's proposal does not come as "an essential part of a larger regulation of economic activity."¹³⁶ Indeed, the ALI consciously declined to regulate the substance of interstate commercial transactions, opting instead for a procedural regulation of dispute resolution.¹³⁷

The absence of substantive rules also suggests the ALI's proposed removal power cannot be sustained as an exercise of Congress's commerce power under the Necessary and Proper Clause. The Supreme Court has stated that "[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states."¹³⁸ In so stating, the Court was not construing the Commerce Clause to mean more than it says, but was noting that Congress has power "[t]o make all Laws which shall be necessary and proper to carry into Execution"¹³⁹ the power "to regulate Commerce ...

134. *Lopez*, 115 S. Ct. at 1631.

135. *Id.*

136. *Id.*

137. AMERICAN LAW INSTITUTE, *supra* note 1, at 3-4 (proposing substantive law is outside the Project's scope); *id.* at 305 (discussing the improbability that Congress will provide substantive rules).

138. *United States v. Darby*, 312 U.S. 100, 118 (1941).

139. U.S. CONST. art. I, § 8, cl. 18.

among the several States.”¹⁴⁰ The Court further stated that the commerce power “extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.”¹⁴¹ Despite its breadth, however, the Necessary and Proper Clause is also consistent with a commercial limitation on the commerce power.

As stated in *McCulloch v. Maryland*,¹⁴² the Necessary and Proper Clause grants additional power to Congress. The power granted, however, is limited by the ends for which it is given.¹⁴³ The relevant end to which the Necessary and Proper Clause may be invoked is to carry into execution Congress’s power to regulate commerce among the several states.¹⁴⁴ The

140. U.S. CONST. art. I, § 8, cl. 3.

141. *Darby*, 312 U.S. at 118.

142. 17 U.S. (4 Wheat.) 316 (1819).

143. *Id.* at 420 (“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter of the constitution, are constitutional.”).

144. See U.S. CONST. art. I, § 8, cls. 3, 18. Several ambiguities in *McCulloch* raise difficulties with a textual reading of the Necessary and Proper Clause. First, the power to regulate commerce may carry with it implied powers. Marshall’s opinion in *McCulloch* does not clearly answer whether these implied powers are legitimate “ends” toward which the Necessary and Proper Clause may supply additional means, or whether the Necessary and Proper Clause defines the extent of implied powers. Marshall gives as an example the powers to carry the mail and punish related crimes as implied from the power “to establish post offices and post roads.” *McCulloch*, 17 U.S. at 415. Since this statement is part of his discussion of the Necessary and Proper Clause, which follows the discussion of implied powers, Marshall’s use of the term “implied” here apparently refers to those powers implied under the Necessary and Proper Clause, not to those which would be implied in its absence.

Second, the power to regulate commerce necessarily implies some authority over the object of the grant: in this case, commerce. *McCulloch* does not answer whether the proper end is the power granted or control of the object of the grant.

Third, it is unclear whether *McCulloch* supports a textual link between the Necessary and Proper Clause and the power in whose aid it is invoked. Of special difficulty is Marshall’s failure to show how the bank was a proper means of carrying into execution the power granted in the Commerce Clause. He cited the Commerce Clause among other “great powers,” but his analysis centered on the powers to collect and spend taxes and to support troops.

Throughout this vast republic, . . . revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require that the treasure raised in the north should be transported to the south, that raised in the east conveyed to the west, or that this order should be reversed. Is that construction of the constitution to be

scope of commerce power under the Necessary and Proper Clause therefore depends on the meaning of the power "to regulate."

The Supreme Court has most often defined the power to regulate as the power to "to *prescribe the rule* by which commerce is to be governed."¹⁴⁵ The Necessary and Proper Clause therefore grants Congress additional power to use means appropriate to attain the end of prescribing substantive commercial rules. I use the term "substantive" to refer to those rules which provide legal standards for the conduct of commerce or commercial actors. One type of means appropriate to this end is the establishment of officers, agencies, or courts to propose or adopt substantive rules. This would include the establishment of a forum to resolve commercial disputes by reference to express or implied federal policies. By selecting this type of means, Congress is essentially delegating its power to enact substantive commercial rules—to conform the conduct of commercial actors to federal policy of some nature.

Another type of means appropriate to attain the end of prescribing substantive commercial rules is the enactment of rules adapted to make the substantive commercial rules effective.¹⁴⁶ This would include incidental power to regulate non-

preferred which would render these operations difficult, hazardous, and expensive?

Id. at 406. The power to regulate commerce, at least under the affecting-commerce rationale, is not a power to act directly, as in these cases, but to provide rules governing the actions of others.

Although it is unclear whether *McCulloch* supports linking the powers granted under the Necessary and Proper Clause to the meaning of the word "regulate," that is the most obvious construction of the constitutional text.

145. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196-97 (1824) (emphasis added). The Court has consistently repeated this formulation in modern Commerce Clause cases. *EEOC v. Wyoming*, 460 U.S. 226, 248-49 n.7 (1983) (Stevens, J., concurring) (applying the Age Discrimination in Employment Act of 1967 to state Game and Fish employees); *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 276 (1977) (finding that federal shipping licensure preempted state fishing restrictions); *National League of Cities v. Usery*, 426 U.S. 833, 840 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (stating that regulations of wages are generally valid, but finding their application to state governments improper); *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 255 (1964) (approving prohibition of racial discrimination in interstate commerce); *North American Co. v. SEC*, 327 U.S. 686, 704 (1946) (upholding validity of the Public Utility Holding Company Act of 1935); *United States v. Darby*, 312 U.S. 100, 113 (1941) (upholding the Fair Labor Standards Act of 1938).

146. The most obvious type of means are straightforward grants of enforcement power, although policymaking by necessity enters into enforcement decisions.

commercial activity related to commercial activity.¹⁴⁷ In the absence of substantive commercial rules, however, there is no incidental power—there can be no appropriate means because they would not serve the constitutional end of making the commercial rules effective. Providing a federal forum alone would not therefore advance the “regulation” of commerce in the sense of providing rules for its conduct. Under the ALI’s proposal, state law provides the standard of care to be exercised or the contract principles to be considered when drafting commercial agreements. Federal resolution of the state issues does not affect the parties’ legal duties outside of court. Thus, the removal power authorized by the ALI proposal is not within Congress’s commerce power under the Necessary and Proper Clause.

One argument against this interpretation of the Necessary and Proper Clause could be construed from the Supreme Court’s approval of the Federal Arbitration Act.¹⁴⁸ The Act makes arbitration provisions of interstate commercial contracts enforceable but does not itself provide the rules which govern the arbitrators’ decisions. In *Southland Corp. v. Keating*,¹⁴⁹ however, the Court cited Marshall’s language in *Gibbons* to show that the Act did provide a substantive rule of contract law to govern interstate commerce: namely, that a contractual arbitration provision is valid as a matter of federal substantive law.¹⁵⁰

This interpretation of the Necessary and Proper Clause could also be challenged under the theory that Congress has power to refer all disputes involving interstate commerce to the federal courts.¹⁵¹ Unless, however, Congress provides the substantive rule to be applied, or delegates the power to establish those rules to the courts, the federal forum would still not render effective any rule governing commerce. Since the ALI proposal suggests neither substantive regulation of interstate commerce nor the development of substantive federal common

147. *United States v. Lopez*, 115 S. Ct. 1624, 1631 (1995).

148. 9 U.S.C. §§ 1-14 (1994).

149. 465 U.S. 1, 11-12 (1984) (construing the Federal Arbitration Act as binding on state courts as well as on federal courts).

150. *See id.*

151. This proposal is discussed in terms of “protective jurisdiction” in the context of federal question jurisdiction. *See Epstein, supra* note 20. Again, even if the Necessary and Proper Clause were construed to permit protective jurisdiction, the argument would have to undergo federal question scrutiny. *See id.*

law, the regulation of intrastate litigation is not authorized by the Necessary and Proper Clause.

Since this interpretation of the Necessary and Proper Clause depends on the meaning of the word "regulate," a different construction of that term would alter the conclusion. "Regulate" could be interpreted as the exercise of "control" over commerce. Under this interpretation, power to do whatever it takes to "control" commerce, whether by substantive rule or otherwise, would include power over anything that affects commerce. This broad reading of "regulate" would justify an affecting-commerce rationale without a commercial limitation since any activity affecting commerce threatens Congress's control over it. The strongest support for this interpretation of "regulate" appears in the *Second Employers' Liability Cases*.¹⁵² The Supreme Court there stated in bold terms that the power to regulate meant the power "to foster, protect, control and restrain."¹⁵³ There, however, Congress had exercised control by means of a substantive rule governing commerce itself: a rule defining railway companies' liability to their employees.¹⁵⁴

Even the earliest argument for Congressional control over commerce, in *Gibbons v. Ogden*, was advanced in the context of substantive regulation. Daniel Webster, arguing for exclusive federal jurisdiction over interstate commerce, said, "Now, what is the import of this, but that Congress is to give the rule—to establish the system—to *exercise the control over the subject*? And can more than one power, in cases of this sort, give the rule, establish the system, or exercise the control?"¹⁵⁵ Even Webster, though, understood that this control would be exercised by rule, for he called it "this power of giving the general rule."¹⁵⁶ The Court responded to Webster's argument as follows:

It has been contended by the counsel for the appellant, that, as the word "to regulate" implies in its nature, *full power over the thing to be regulated*, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire

152. 223 U.S. 1 (1912).

153. *Id.* at 47.

154. *Id.* at 6-10.

155. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 15 (1824) (emphasis added).

156. *Id.* at 16.

result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated.

There is great force in this argument, and the Court is not satisfied that it has been refuted.¹⁵⁷

The Court, however, did not rely on this expansive interpretation of the power to regulate,¹⁵⁸ and later clarified that the commerce power did not confer exclusive jurisdiction on the federal government in all cases.¹⁵⁹ Even had the Court held that Congress had exclusive jurisdiction, the "full control" language would need to be construed in light of the Court's definition of the power to regulate: Congress may, *by means of a rule governing commerce among the several states*, exercise full control over that commerce.

The Court's later discussions of the power to control commerce also involved substantive rules governing interstate commerce rather than rules enacted merely to exert an effect on commerce. *The Daniel Ball*,¹⁶⁰ for instance, involved an actual rule governing interstate commerce: a requirement that the owners, operators, or captains of a ship obtain a license from the United States.¹⁶¹ The Court's broad statement that the power to regulate commerce "authorizes all appropriate legislation for the protection or advancement of either interstate or foreign commerce,"¹⁶² must therefore be understood in the case's substantive-rule context. Similarly, *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,¹⁶³ based the Federal Arbitration Act "upon . . . the incontestable federal foundations of control over interstate commerce and over admiralty."¹⁶⁴ The case involved, however, control through a rule

157. *Id.* at 209 (emphasis added).

158. *Id.* at 209-11 (relying instead on the Supremacy Clause to require the New York law to "yield to the law of Congress").

159. *E.g.*, *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851) (demonstrating an early attempt to vest exclusive jurisdiction in some but not all commerce cases); *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945) (exemplifying a modern balancing approach to define the states' authority under the Commerce Clause).

160. 77 U.S. (10 Wall.) 557 (1870).

161. *Id.* at 564.

162. *Id.* at 564.

163. 388 U.S. 395 (1967).

164. *Id.* at 405 (internal citations omitted).

actually governing interstate commerce. Likewise, *North American Co. v. SEC*¹⁶⁵ mentioned that the commerce power “‘extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the *full control by Congress* of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations.’”¹⁶⁶ The case again involved an actual rule governing interstate commerce.¹⁶⁷

Congress therefore has commerce power under the Necessary and Proper Clause to regulate activity, including noncommercial activity such as intrastate litigation, if its regulation facilitates the enforcement of federal substantive rules affecting the parties’ commercial conduct outside of court. As applied, the Necessary and Proper Clause does not give Congress power to regulate intrastate litigation, since its regulation does not facilitate the enforcement of substantive rules.

2. *Jurisdictional element*

Still another route to regulation of noneconomic activity is to require the satisfaction of a jurisdictional element. A statute containing a jurisdictional element requires the government to prove in each proceeding specified facts showing authority over the persons or subject matter involved in the proceeding. Where an activity does not *as a class* come within Congress’s constitutional authority, Congress can nevertheless regulate *individual instances* of that activity that do come within its power by including a jurisdictional element in the statute. The Court in *Lopez* noted that the statute there did not require such case-by-case proof that individual instances of the activity regulated had “an explicit connection with or effect on interstate commerce.”¹⁶⁸

Satisfaction of a jurisdictional requirement would authorize removal for a narrow but important class of intrastate cases. For example, a corporation that is deemed to be a citizen of California might face products liability actions throughout

165. 327 U.S. 686 (1946) (upholding validity of the Public Utility Holding Company Act of 1935).

166. *Id.* at 705 (quoting *Minnesota Rate Cases*, 230 U.S. 352, 399 (1913)) (emphasis added).

167. *Id.* (involving a rule governing the registration and conduct of public utility holding companies).

168. *Lopez*, 115 S. Ct. at 1631.

the nation. Assuming that the corporation could remove and transfer for consolidation to a single trial all its other cases, the Commerce Clause would not authorize removal of certain of the corporation's California cases—those originally filed in California state courts by California citizens and governed by California law. In these cases, however, a substantial effect on interstate commerce could be found, thus satisfying the jurisdictional requirement. The actions would arise out of interstate commerce, namely the sale of goods produced for both interstate and intrastate commerce by an interstate seller. The defendant could probably quantify its increased cost of defending individual actions—costs which would economically effect interstate commerce. If the related cases were instead consolidated outside of California, and the California cases remained in the state, the multistate defense would generate significant interstate travel and commerce by witnesses, litigants, and lawyers. This subset of intrastate litigation would therefore have both a qualitative relationship to and a quantitative effect upon interstate commerce. By imposing a jurisdictional element, Congress could thus reach this subset of cases without exerting power over all intrastate litigation, most of which has an effect on interstate commerce too attenuated to satisfy the requirement.

3. *Less attenuated arguments*

Even after *Lopez*, the government could frame an argument for regulation of other subsets of noneconomic activities that in the aggregate have a substantial effect on interstate commerce. The government's argument, however, would have to contain other self-contained limits to satisfy the requirement that congressional power over that subset of activities be consistent with the concept of enumerated powers. Although *Lopez* emphasized the absence of commercial activity, the Court's main criticism with the government's arguments was their limitless nature.¹⁶⁹ It is therefore possible that the commercial activity requirement applies only when the government's arguments have no other self-contained limits. Indeed, the decision in *Lopez* could be seen as applying only where the relationship to commerce is weak in similarity (because a non-

169. See *id.* at 1632-34.

economic activity is involved),¹⁷⁰ effect,¹⁷¹ and proximity.¹⁷²

In the context of intrastate litigation, the government could argue that Congress has power to regulate the resolution of disputes arising out of commercial transactions even though Congress has not enacted substantive rules governing the transactions themselves. Although this limitation would differ from the commercial limitation, it might satisfy the Court that the commerce power is still subject to some "judicially enforceable outer limits" on the Constitution's enumerated powers.¹⁷³ Under this reasoning, Congress could regulate intrastate litigation arising out of commercial transactions, but not all intrastate litigation. Because this reasoning allows federal courts to resolve disputes in the absence of substantive federal commercial rules,¹⁷⁴ I find it unpersuasive for the reasons stated above.

4. Congressional findings

Finally, the Court may give Congress more leeway to regulate noncommercial activities such as intrastate litigation if Congress makes strong, factually grounded findings connecting the activities with interstate commerce. In *Lopez* the Court noted that congressional findings help the Court in its "independent evaluation of constitutionality under the Commerce Clause,"¹⁷⁵ yet concluded: "But to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in [*Lopez*] substantially affected interstate commerce, *even though no such substantial effect was visible to the naked eye*, they are lacking here."¹⁷⁶ The dissenters were disturbed at the suggestion that findings could affect Congress's authority.¹⁷⁷ Reading the opinions together,

170. *Id.* at 1630-31 (classifying prior affecting-commerce decisions as involving "economic activities"); *id.* at 1632-34 (defending the Court's commercial limitation).

171. *Id.* at 1633-34 (stating that the question is of size or degree).

172. *Id.* at 1634 (concluding that the government's arguments would require the Court "to pile inference upon inference" and noting the absence of "any concrete tie to interstate commerce").

173. *Id.* at 1633.

174. *See supra* part IV.E.1 (outlining a theory of commerce power under the Necessary and Proper Clause).

175. *Lopez*, 115 S. Ct. at 1631 (emphasis added).

176. *Id.* at 1632 (emphasis added).

177. *See id.* at 1655-57 (Souter, J., dissenting); *id.* at 1658 (Breyer, J., dissenting).

it appears that findings would likely make a difference to a majority of the Court only in cases involving activities with nonobvious effects on interstate commerce, effects which, once established, can be shown to be substantial. Even in these cases, however, the same showing would probably suffice if advanced by the government's lawyers at trial and not by Congress in the legislation itself. Findings would therefore help the government only if Congress were better suited to proving substantial effects than the government's lawyers.

F. Relevance of Historical State Sovereignty

Justice Souter also criticized the Court¹⁷⁸ for its reference to "areas such as criminal law enforcement or education where States historically have been sovereign."¹⁷⁹ The Court made that reference to point out the limitless nature of the government's arguments, arguments that it felt would, if accepted, give Congress "a general police power of the sort retained by the States."¹⁸⁰ The Court's reference to state sovereignty therefore appears directed at illustrating this limitlessness, not at arguing for an exception from the commerce power that Congress would otherwise have. At most, the Court's comment suggests that the majority might use historical state sovereignty as an indication of whether a proposed application of the affecting-commerce rationale is consistent with the concept of enumerated powers.

Justice Kennedy's opinion, on the other hand, reveals a much greater concern for state sovereignty. Congressional expeditions beyond commercial actors, conduct, or statutes should in his view "at least" provoke the Court to inquire "whether the exercise of national power seeks to intrude upon an area of traditional state concern."¹⁸¹ Justice Kennedy's proposal may imply relaxed scrutiny in areas where the federal government was the first in the field, or perhaps heightened scrutiny where the states have historically exercised their power alone. If interference with areas of historic state concern were dispositive, the states' interest in enforcing their own laws between their own citizens would strongly oppose a removal power over intrastate litigation. Justice Souter's opinion aptly points out the

178. *Id.* at 1654-55 (Souter, J., dissenting).

179. *Id.* at 1632.

180. *Id.* at 1632, 1634.

181. *Id.* at 1640 (Kennedy, J., concurring).

flaws in Justice Kennedy's approach. Further, *Garcia* held that the Fourth Amendment does not protect states from the reach of the Commerce Clause.¹⁸² Kennedy does not explain why the Commerce Clause limits its own reach to protect the states.

V. CONCLUSION

Under the Supreme Court's reasoning, intrastate litigation as a class is probably beyond Congress's commerce power. Although the definition and application of *Lopez*'s commercial limitation leave room for doubt, the likely resolution of those doubts points away from general federal removal power. Only in a discrete class of cases, in which a jurisdictional element has been satisfied, could removal be justified under the Commerce Clause. Thus, the ALI's proposal to authorize removal of intrastate litigation cannot rest solely on Congress's commerce power.

Kelly G. Black

182. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).